Decision

dated 26 April 1995 (K. 11/94)

The Constitutional Tribunal sitting with the bench composed of the Chairman Zdzisław Czeszejko-Sochacki and Judges: Lech Garlicki (Reporting Judge), Krzysztof Kolasiński, Ferdynand Rymarz, Błażej Wierzbowski

(...)

held

1. article 3, section 3, 3a, 3b and 4 of the Economic Activity Act dated 23 December 1988 (Journal of Laws, Number 41, Item 324; 1990, Number 26, Item 149; Number 34, Item 198; Number 86, Item 504; 1991, Number 31, Item 128; Number 41, Item 179; Number 73, Item 321; Number 105, Item 452; Number 106, Item 457; Number 107, Item 460; 1993, Number 28, Item 127; Number 47, Item 212; Number 134, Item 646; 1994, Number 27, Item 96 and Number 127, Item 627) **does not violate articles 1, 6, 7 and 67, section 2 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relationships between the Legislative and Executive Branches of the Republic of Poland and on Local Self government** (Journal of Laws, Number 84, Item 426, amended in 1995, Number 38, Item 148).

2. article 25e, 25f, 25g and 25h of the Economic Activity Act (Journal of Laws, Number 41, Item 324; 1990, Number 26, Item 149; Number 34, Item 198; Number 86, Item 504; 1991, Number 31, Item 128; Number 41, Item 179; Number 73, Item 321; Number 105, Item 452; Number 106, Item 457; Item 107, Item 460; 1993, Number 28, Item 127; Number 47, Item 212; Number 34, Item 646; 1994, Number 27, Item 96 and Number 127, Item 627) **within the sco e in which article 3, section 4 of this Act refers them to businesses which, under separate provisions of law are obliged to maintain books of revenues and expenditures are in breach of article 1 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relationships between the Legislative and Executive Branches of the Republic of Poland and Local Self government** (Journal of Laws, Number 84, Item 4?6, amended in 1995 Number 38, Item 184) **because they violate an absolute principle according to which only the law (statute) may determine the essentials of criminal acts.**

Reasoning

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III

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2. Economic activity freedom as expressed in article 6 of the constitutional provisions is not absolute, and. like other constitutional rights and freedoms. it may be subject to certain limitation bv the lawmaker. By and large, general constitutional principles apply here: an individual’s rights and freedoms may be limited only when it was authorized in the constitutional provisions; limitations can be introduced only if necessary and as an exception; neither particular limitations nor their aggregate sum may affect the „essence” of rights and liberties they concern (see, particularly a Constitutional Tribunal resolution of 2 March 1994, W 3/93, OTH 1994, p. 158-159). As far a s economic activity freedom is concerned, the possibility of its limitation (regulation) has been expressly admitted in article 6 of the constitutional provisions which read that „the limitation of this freedom may be only by statute.” The Constitutional Tribunal is of the opinion that economic activity due to its nature,

and particularly because of its close relationship with individual interests as well as public interest may be subject to various limitations to a larger degree than rights and freedoms of a personal and political nature. In particular, there is a legitimate state interest in creating such legal framework for trade as to minimize wrongdoing both in relationships between economic entities and in fulfilling by these entities their public obligations, *inter alia*, their tax liabilities.

The extent to which the Constitution permits limitations of economic activity freedom has been already a subject of Constitutional Tribunal decisions. From a more formal point of view, article 6, quoted above, of constitutional provisions means that statutory regulation is the only permissible form of limiting this freedom. Therefore, forbidden as unconstitutional, is an independent, not based on a specific statutory delegation, imposing of limitations by acts not having the rank of a statute. (see Constitutional Tribunal judgment of 12 February 1991, K. 6/90, Constitutional Tribunal's Collection of Decisions 1991, p. 22. The Constitutional Tribunal has for a long time seen in article 6 its substantive aspect and held that this norm has not given the lawmaker a free hand to interfere with the economic activity freedom, unless in the form of a law (statute). In its earlier judgments it pointed out that limitations of an activity are allowed when such activity „affects any interest considered worth protecting by the lawmaker" (K 6/90, p. 22). In the same year it expressed a view that „limitation of freedom referred to in article 6 ...cannot be discretionary (judgment of 9 April 1991, U. 9/90, Constitutional Tribunal's Collection of Decisions 1991, p. 147), and „it is understood that at the foundation of such limitation should lay rational reasons" (judgment 17 December 1991, U. 2/91, Constitutional Tribunal's Collection of Decisions 1991, p. 160). Apparently, this approach found an expression in a judgment of 20 August 1992, K. 4/92: „The introduction of limitations in the economic activity freedom by a statute does not necessarily mean that it conforms with article 6...The requirement of a statutory form of limiting such provision constitutes only a minimal condition. A limitation must be then justified to a point where in conflict with the principle of economic activity freedom the axiological balance has been outweighed in favor of the limitation." (Constitutional Tribunal's Collection of Decisions 1992, part II, p. 22; see also resolution of 2 June 1993, W. 17/92, Constitutional Tribunal's Collection of Decisions 1993, p. 430). In light of jurisdiction so stable there is no question that the Constitutional Tribunal may assess the merit of limitations imposed on the economic activity freedom in a statute.

A general constitutional conditions of limiting rights and freedoms of an individual could serve as a point of reference for such assessment. From this point of view, of particular importance is the principle that limitations of rights and freedoms may be introduced only „if necessary." It expresses a general notion of rights and freedoms as a sphere of freedom of an individual where the State (lawmaker) can interfere only if it is necessary and only to the extend that is necessary.

The essence of the above ban on excessive interference is based on the assumption that the lawmaker may not establish limits constituting an excessive burden, and particularly, destroy a balance between the degree of interference and the importance of public interest thus being protected. Generally, a ban on excessive interference plays a protective role to all individual rights and freedoms (however the criteria of „excessiveness" must be relative as the character of particular rights and freedoms varies). Its addressee is the State whose actions toward an individual should be dictated by actual needs. This ban has become then one of the manifestations of maintaining confidence in the State and, at the same time, one of the requirements that the democratic state imposes on its organs. In such form this concept is being presented in the theory and jurisdiction of Eastern Europe. At first if found its place in administrative courts decisions which tied the ban with an excessive interference with

implementing statutes by public administration. From 1950ties this concept began to find its way also in the constitutional jurisdiction (particularly German, then Austrian, Swiss and Spanish) which addressed the ban to a state. The jurisdiction of the Polish Constitutional Tribunal, as quoted above, has referred to the above concept.

To the Constitutional Tribunal it is possible to generalize its previous decisions and tie the ban on excessive interference with article 1 of the constitutional provisions. Consideration on whether the lawmaker has violated the ban should take into account special features of given individual rights and freedoms (more restrictive standards apply to personal and political rights and freedoms than economic and social ones), because they determine the general boundaries of permissible limitations. These considerations should provide answers to the following three questions: 1) is the regulation capable of achieving the intended objectives? 2) is this regulation necessary to protect the public interest it refers to? 3) are its results proportional to the burdens imposed on citizens? (proportionality, mentioned e.g. in Constitutional Tribunal judgment of 26 January, 1993, U. 10/92, Constitutional Tribunal's Collection of Decisions 1993, p. 32).

It is not up to the Constitutional Tribunal to review the substance and feasibility of the solutions adopted by the lawmaker The point of departure for its judgments is always the assumption of rationality of the lawmaker and presumption of constitutionality of its actions. However, if the Constitution requires the lawmaker to issue statutes consistent with so general principles as the democratic rule of law or of maintaining confidence in the State, than it commands the Tribunal to intervene in all cases where the lawmaker has overstepped the boundaries of his regulatory freedom in a manner so drastic that the violation of the above constitutional clauses is evident.

3. Having made general observations, the Tribunal moved on to a question of whether the regulations disputed by the Commissioner for Citizens' Rights do not violate a ban on excessive interference. There is no doubt that freedom of the lawmaker in regulating economic activity is going to be wide, and the need for public interest protection (referring both to the interests of other participants in trade and of the State itself) is more prominent than in the case of personal and political rights and freedoms. It finds its expression also in the wording of article 6 of constitutional provisions which assume simply the existence of statutory limitations of that freedom.

A premise for amending the Economic Activity Act was to prevent the uncontrolled flow of financial resources in the private sector to counter tax fraud, obtaining credit in a fraudulent way, irregularities in business and „money laundering," etc. The Constitutional Tribunal has recognized the existence of a substantial public interest in passing a law for this purpose, particularly to protect state interests and the interest of those business entities which conduct their business in an honest and legal way. If a gray economy exists in Polish reality then it is the lawmaker's right and duty to adopt statutes aimed at its elimination.

Imposing, on all economic entities, a duty to have orderly system of bank accounts and to make expenditures through these accounts obviously has a chance to create the results intended by the lawmaker. Trading through banks is easier to review and a fuller information on bank accounts contributes to the elimination of illegal actions.

It is possible also to assume that the introduction of the above obligations is necessary to secure an adequate protection of public interest intended by the lawmaker. There are no other, equally effective, ways to review trade as bank documents. Therefore there are no grounds to question law-maker's general ability to impose an obligation of running important transactions through the banking system, particularly that such solutions are common in the more developed countries of the world.

Details of such regulation, specifically the actual burdens imposed in this process upon the participants of trade require consideration. In other words, the question is whether proportions have been maintained between the objectives (effects) of such a regulation and the burdens it may cause to citizens-subjects of the economic activity freedom. The assessment of the challenged regulation should be made taking into account its whole legal background.

4. These are the issues on which concentrate the allegations raised by the Commissioner for Citizens' Rights, never shared by the Constitutional Tribunal. One can agree that actual situation of Polish banks is not always the best guarantee of efficiency and reliability of their operations (the notion in article 16, section 2, sub-section 1 of the bank law is not adequate). It can also be admitted that the present regulation of banking activities does not provide any outside limitations as to the amount of provisions and fees (article 53, section 1 of the bank law). Even if the obligation to conduct business through banks means additional problems for economic entities, one cannot say they are excessive (out of proportion) compared to the public interest they are designed to protect.

A similar conclusion could be drawn in reference to the allegation of lack of adequate banking guarantees. It is true that in the present legal state bank guarantees are few. The bank law accepts responsibility of the Treasury only for personal savings accounts, and what is more this guarantee does not encompass all banks (article 49 of the bank law as amended on 14 December 14 1994). As a rule bank deposits in the accounts referred to in article 3, section 3 of the Economic Activity Act will not be able to resort to these guarantees. In turn, the Act dated 14 December 1994 on a Bank Trust Fund (Journal of Laws, 1995, Number 4, Item 18) introduced guarantees for financial deposits only to the amount of up to the equivalent of 3000 ECU (and one hundred percent guarantee covers only 1000 ECU) – article 23, section 2. But the Economic Activity Act introduced an imperative of spending through a bank each time a value of receivables or if the obligation exceeds 3000 ECU. Then, in all situations where an economic entity is obliged to use a bank account, financial resources in this account are not fully guaranteed. It may expose this economic entity to serious losses should it choose a wrong bank for its financial operation. It has to be pointed out, however, that assuming risk lies at the heart of business (and a system of voluntary insurance is in place). As of present the banking system gives many choices and it is a matter of business calculation whether to choose better (cheaper) conditions of banking or more expensive but less risky. A wrong choice may have serious consequences and may lead to the loss of property by citizen, but in the present economic system the State cannot assume full responsibility for the private sector. However, the State may (and even has to) have mechanisms in place to protect from dishonest economic behaviors so ubiquitous in the Polish economic reality.

The Constitutional Tribunal has not found a dramatic lack of proportion between the burdens which may result for citizens from a new regulation of financial operations and the significance of public interest this regulation was meant to protect. One cannot overlook the actual dimension of corruption in Polish business reality and it would be difficult to deny the lawmaker the right to use the banking system in a manner common in many other states. Then this is not a case of the lawmaker trespassing its regulatory freedom. Disputed provisions constitute a permissible, statutory limitation of economic activity freedom (article 6 of the constitutional provisions), as – hypothetically – property losses suffered by economic entities caused by bankruptcy of banks have only an indirect relationship with the analyzed situation and, under no circumstances should lead to property being taken over by the State.

5. The Constitutional Tribunal did not share the view of the Commissioner for Citizens' Rights that mandatory bank transfers violate the principle of equality as they favor banks over the economic entities tied with them by agreements. The principle of equality concerning civil

rights and freedoms is tantamount to a ban on regulations tainted with discrimination or favoritism (see Constitutional Tribunal judgment dated 9 March 1988, U. 7/87, p. 14 and numerous subsequent judgments) provided that the addressees of legal norms possess the same characteristics. In other words, treating equal subjects unequally is forbidden; this does not preclude the unequal treatment of unequal subjects.

Therefore even if the principle of equality applied to banks and other economic entities, which is not obvious in light of article 67, section 2 of the constitutional provisions, then banks and other „subjects" could not be considered „similar" to a degree justifying the application of all the consequences of equality. The legal situation of banks is specific and generally could be likened to the legal situation of other economic entities. The fact that in civil law banks enter into relationships based on equality of parties does not mean that their situation must be the same under constitutional law.

6. The amendment of the Economic Activity Act was not limited to the imposition of new obligations on economic entities, but simultaneously established substantive fines for their violation. This amounts to the emergence of penal provisions. Regulations of this kind are subject to much more severe criteria than regulations on economic activity freedom as they directly touch the sphere of the personal rights of citizens.

The Constitutional Tribunal has already indicated that „under a democratic State ruled by law, criminal law must be founded on at least two basic principles: forbidden actions have to be defined by law (*nullum crimen, nulla poena sine lege*) and the retro-active effect of law introducing criminal punishment or making it more severe is banned" (decision of 25 September 1991, S. 6/91, Constitutional Tribunal's Collection of Decisions, 1991). The Constitutional Tribunal has narrowed the requirement to define forbidden actions as follows: „the material elements of an action deemed to be criminal must be defined by a statute (according to the constitutional principle of statutory regulation) in a complete, precise and unequivocal manner" (decision of 13 June 1994, S. 1/94, Constitutional Tribunal's Collection of Decisions 1994, part I, p. 271). In its judgment dated 1 March 1994 (U. 7/93, Constitutional Tribunal's Collection of Decisions 1994, part I, p. 41) the Constitutional Tribunal noted that „in light of the constitutional division of matters between statutes and executive acts, the basic elements of both the action and the punishment have to be described by the statute itself; it may not be left *in blanco* to the executive regulation. This refers not only to the penal provisions *sensu stricto* but also to all provisions of a repressive nature (sanctions, disciplinary), in other words, all provisions aimed at punishing citizens in one form or another. This stems, among others, from article 1 of the constitutional provisions upheld in force" (ibid., p. 41).

The above jurisdiction of the Constitutional Tribunal leads to the conclusion that the statutory wording of penal (repressive) provisions must be in complete agreement with the principle of defining forbidden actions. It means that the statute itself has to define all the elements of a punishable action in a complete, precise and unequivocal manner Naturally, this includes the range of persons to which a given penal provision has been addressed. Then the statute has to specify categories of persons liable to be punished for a given action. This cannot be done, however, by executive regulation, because statutory exclusivity is absolute in criminal law. It follows from the rule: *nullum crimen sine lege* – an inherent element of the rule of law (article 1 of the constitutional provisions).

The Commissioner for Citizens' Rights has not elaborated on these aspects of the challenged regulation in his petition. But since he alleged that it violates article 1 of the constitutional provisions, it is the Constitutional Tribunal's duty to examine whether it conforms to the orders and bans constituting the substance of the democratic rule of law.

Analysis of article 25e-25h of the Economic Activity Act, made from this point of view, indicates that these provisions do not independently determine their own subjective scope and refer to article 3. In turn article 3, section 4 does not contain an exhaustive definition of the obliged party and refers to „separate provisions" which indicate who is obliged to keep accounting ledgers and ledgers of revenues and expenditures for tax purposes.

The Accountancy Act dated 30 September 1994 stipulates who is obliged to keep accounting ledgers. Comparing its provisions with article 3, section 4 and article 25e-25h of the Economic Activity Act allows one to construct a criminal law norm where a statute is to define all the elements. It elicits the question of whether the applied legislative methodology was optimal; it is not sufficient to state the contravention of statutory exclusivity.

The situation varies when it comes to subjects obliged to keep accounting ledgers of revenues and expenditures. The subjective scope of this obligation was determined in a regulation of the Minister of Finance of 15 December 1992, an act of a sub-statutory nature. It is true that this regulation used properly the delegation in article 38, sub-section 3 of the Tax Liability Act, but the act does not tie the obligation to keep books to penal provisions, thus it may authorize a wider scope of regulation in executive acts. But the new articles 25e-25h of the Economic Activity Act have tied this regulation to another area of law – statutes repressive in nature. The new legal situation assumes the construction of criminal norms by including elements not contained in a statute and defined in ministerial regulations, in violation of the principle of statutory exclusivity in formulating penal provisions.

The Constitutional Tribunal has never questioned that the proper realization of duties established in the new article 3 of the Economic Activity Act requires certain sanctions of a punitive nature. As long as it has not been thoroughly regulated in a statute, it is irreconcilable with the requirements provided for this kind of regulation in article 1 of the constitutional provisions. And as long as the subjective scope of a category of „subjects obliged to keep tax ledgers of revenues and expenditures" shall be determined not by statute but by a minister, it cannot be the basis of any penal provision as executive authorities do not have the constitutional power to issue such norms.

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